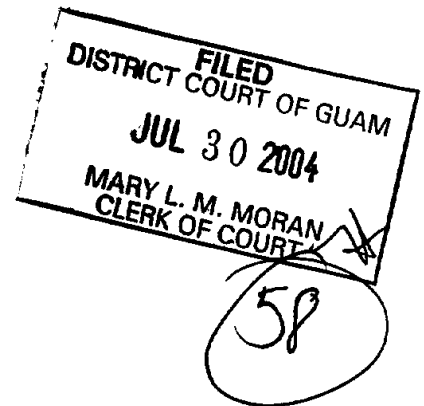


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8 IN THE DISTRICT COURT OF GUAM
9
10 TERRITORY OF GUAM

11 JULIE BABAUTA SANTOS,
12 Individually and on behalf of all those
13 similarly situated,

14 Petitioner,

15 vs.

16 FELIX CAMACHO, Governor of Guam,
17 ART ILAGAN, Director of Department
18 of Revenue and Taxation, LOURDES M.
19 PEREZ, Director of Department of
Administration, and GOVERNMENT
OF GUAM,

20 Respondents,

21 CHRISTINA M. S. NAPUTI,

22 Petitioner/Intervenor.
23
24
25

Docket No. Civ.04-00006

**REPLY TO PETITIONER'S
AND RESPONDENTS'
OPPOSITIONS TO
APPLICANT FOR
INTERVENTION NAPUTI'S
MOTION TO INTERVENE
with MEMORANDUM OF
POINTS AND AUTHORITIES.**

Class Action

~~~~~  
J.B. Santos, et al. v. Governor F.P. Camacho, et al., CHRISTINA M. S. NAPUTI, Petitioner/Intervenor.  
REPLY TO OPPOSITIONS TO APPLICANT FOR INTERVENTION NAPUTI'S MOTION TO INTERVENE  
with MEMORANDUM OF POINTS AND AUTHORITIES. Civil Case No. CIV04-00006

1                   \* \* \* **REPLY TO OPPOSITION TO MOTION TO INTERVENE** \* \* \*

2                   COMES NOW Petitioner/Intervenor CHRISTINA M.S. NAPUTI (hereinafter  
3                   “Intervenor Naputi”) through her counsel VAN DE VELD SHIMIZU CANTO & FISHER, by Curtis C.  
4                   Van de veld, Esq., to reply to Petitioner Julie Babauta Santos’ (hereinafter “Petitioner Santos”)  
5                   and Respondent Government of Guam’s oppositions to Intervenor Naputi’s motion to  
6                   intervene, which Intervenor Naputi had filed on June 29, 2004. Without seeking leave of the  
7                   court, counsel for Petitioner Santos filed a 34-page document without any Table of Authorities  
8                   on July 23, 2004, in violation of District Court of Guam Local Rule LR 7.1(g). Petitioner  
9                   Santos’ counsel filed an amended opposition on July 26, 2004. On July 23, 2004, Respondent  
10                  Government of Guam also filed a written opposition. As Petitioner Santos thoroughly  
11                  exhausted all of Respondent’s arguments in opposition, any arguments in this reply addressed  
12                  to Petitioner Santos should also be read to reply to Respondent. Intervenor Naputi hereby  
13                  replies to said oppositions before this court pursuant to FRCP Rules 7, 8 and 11, and District  
14                  Court of Guam Local Court Rules, LR 7.1, and LR 23.1. This reply is supported by the  
15                  following memorandum of points and authorities, the documents and pleadings on file, and  
16                  such other further evidence as the court may permit these parties to submit at the hearing of  
17                  this motion.

18                   \* \* \* **MEMORANDUM OF POINTS AND AUTHORITIES** \* \* \*

19                                   Introduction

20                  Petitioner Santos accuses Intervenor Naputi of premising her argument for intervention  
21                  solely on a desire for greater remuneration than that the proposed settlement agreement would  
22                  allow. Adopting a righteously indignant tone, Petitioner Santos pejoratively characterizes  
23                  Intervenor’s motion to intervene as inaction followed by a rushing-in without any shame after  
24                  Petitioner’s counsel had so labored to concoct the proposed settlement agreement. Petitioner  
25                  Santos would have this Court ignore the fact her attorney (without having conducted any  
                 discovery to ascertain the actual class) has acted in concert with the opposing party who is also  
                 his client, the Lieutenant Governor of Guam, to quickly craft a proposed settlement agreement  
                 which compels proper class members to wait 9 years to receive half of what they are legally  
                 entitled, while an estimated \$30 million the Government of Guam would seek to make readily  
                 available to them is instead paid to individuals who have no legal right to it. Petitioner Santos

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1 claims Intervenor Naputi does not raise any issues she herself does not already preserve for the
2 benefit of the class. Petitioner Santos neglects to recognize that she acted to disable legitimate
3 class members as early as her initial description in her "Class Action Petition" of the "class"
4 she purportedly represents, and only further attempts to damage the genuine class entitlees by
5 virtue of the proposed settlement agreement. Intervenor Naputi has advanced this argument in
6 her motion to intervene as one of several original issues regarding the jeopardy in which
7 Petitioner Santos places the class, necessitating intervention by Intervenor Naputi. Whereas
8 Petitioner Santos seeks to mislead this Court into thinking that Intervenor Naputi's only
9 contention is with the amount to be paid to class members via the proposed settlement
10 agreement, the truth as revealed by this and previous filings by Intervenor Naputi is that
11 Intervenor Naputi seeks intervention due to more fundamental impairments of her interest by
12 Petitioner Santos, and due to an integral inadequacy of class representation manifested by
13 Petitioner Santos.

14 Argument

15 **1. Intervenor Naputi Timely Filed Her Motion To Intervene.**

16 Petitioner Santos argues the opportunity for a lawsuit to recover the Earned Income
17 Credit has begged attention for so many years that she herself did not file her own petition for
18 recovery until only 5 months ago. Intervenor Naputi moved to intervene at a stage in the
19 proceedings inhering a pre-judgment, pretrial, pre-discovery posture and, contrary to posing
20 any prejudice to the class, seeks to protect the class integrity.

21 Petitioner Santos cites five cases to support her proposition that Intervenor Naputi's
22 intervention is untimely because it causes prejudice to the parties by delaying relief from long-
23 standing inequities. The facts upon which these rulings are premised; however, are vastly
24 divergent from the present analysis, and they demonstrate how Intervenor Naputi's motion is
25 indeed timely in this context, and how the parties are by no means prejudiced therefrom. In
Calif. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc., the 9th Circuit
found putative intervenors untimely where they waited 6 years after litigation began to file,
and where they were informed of settlement negotiations that had been ongoing for 4 years.
309 F.3d 1113, 1119-20 (9th Cir. 2002). The court held that "[a] party seeking to intervene
must act as soon as he knows *or has reason to know* that his interests might be adversely

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1 affected by the **outcome of the litigation.**” *Id.* at 11120 (citation omitted) (latter emphasis  
2 added). As it is knowledge of the *outcome* of litigation which points to timely intervention, it  
3 is of no relevance that Intervenor did not herself initiate the litigation, as Petitioner Santos  
4 would have this Court believe, despite that Petitioner Santos herself filed her class action  
5 petition only 5 months ago. In the present case, Intervenor Naputi filed for intervention only 4  
6 months after litigation commenced and a mere 2 weeks after the announcement of a proposed  
7 settlement agreement, for which Attorney Phillips conducted negotiations over just a few days  
8 and in such secrecy that the Governor of Guam was not even informed or invited to participate  
9 in any negotiations. The remaining three cases cited by Petitioner Santos contain facts that  
10 further illustrate a complete lack of prejudice to the existing parties by a grant of Intervenor  
11 Naputi’s intervention. In Presidential Life Ins. Co. v. Milken, 946 F. Supp. 267, 276-77 (S.D.  
12 N.Y. 1996), the court found a delay by intervenor of 3 years after final judgment on class  
13 settlement agreement, after parties had expended millions of dollars, constituted prejudicial  
14 untimeliness. In New York News v. Kheel, 972 F.2d 482, 487 (2d Cir.1992), the court denied  
15 *permissive* intervention (which does require impairment of interest) as prejudicial where  
16 intervenor did not seek to join the action as a party, but merely to request Rule 11 sanctions. In  
17 Farmland Dairies v. Commissioner of New York State Dep’t of Agric. & Mkts., 847 F.2d  
18 1038, 1044 (2d Cir. 1988), the court denied as prejudicially untimely a *post-judgment*  
19 intervention where intervenor had fully participated in pre-judgment proceedings beforehand.  
20 As is evident, Petitioner Santos’ use of these cases only confirms that the factual  
21 circumstances of Intervenor Naputi’s cause denote a timely intervention.

22 Petitioner Santos repeatedly trumpets her argument that the intervention by Intervenor  
23 Naputi would only serve to delay a “steady stream of payments” to class claimants and thereby  
24 prejudice parties by possibly preventing the proposed settlement agreement from becoming  
25 final. Petitioner Santos begs the question by presuming the proposed settlement agreement is  
beneficial to the class as a whole, although she purports in her Class Action Complaint to  
represent those who would deprive legitimate claimants of recovery and her counsel attempts  
to further impair Petitioner’s *own stated* class members by expanding the scope of illegitimate  
claimants in the proposed settlement agreement. In Petitioner Santos’ Class Action  
Complaint, she defines the claims of those she seeks to represent to include claimants of the

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1 years 1998 and 1999, whereas the proposed settlement agreement adds the year 1996 to  
2 effectively reduce the amount of recovery to the very individuals she claims she represents.  
3 This misportrayal of the proper definition of class members made by Petitioner Santos in her  
4 initial complaint, which works to deleteriously affect the actual class, is the fundamental basis  
5 for Intervenor Naputi's intervention, notwithstanding that the "steady stream of payments"  
6 promised by the proposed settlement agreement is but a trickle which would take 9 years to  
7 pool.

8 Petitioner Santos continues to argue prejudice to parties by an untimely intervention,  
9 by her misplaced reliance upon cases which are factually inapplicable to the present case. The  
10 Fifth Circuit court, in Corley v. Jackson Police Dep't, 755 F.2d 1207, 1209-10, (5<sup>th</sup> Cir. 1985),  
11 deemed as prejudicially untimely an intervention attempted over 5 years after litigation was  
12 first initiated, 4 years after a consent decree was entered into, and an additional 50 months  
13 after a new legal challenge rekindled the issue; especially given that implementation  
14 procedures upon the consent decree had already been occurring. In Scardeletti v. Debarr, 265  
15 F.3d 195, 203-204 (4<sup>th</sup> Cir. 2001), the court denied intervention to an applicant who had  
16 waited over 2 years from the inception of litigation and 8 months after a settlement had been  
17 reached (which had been 19 months in the making), where the applicant had been participating  
18 in related litigation but had previously openly declined to participate in the case before the  
19 court. The court in Scardeletti, however, did point out that where intervention is sought as of  
20 right, the timeliness requirement should not be as strictly enforced as it would be for a  
21 permissive intervention. 265 F.3d at 203. The Ninth Circuit, in County of Orange v. Air  
22 California, 799 F.2d 535, 538 (9<sup>th</sup> Cir. 1986), ruled an intervenor was untimely when he  
23 moved to intervene 5 years after litigation began, and where a settlement which had taken 5  
24 years to reach was "preceded by extensive and well-publicized negotiations." Such is not the  
25 situation presently before the court as pertains to Intervenor Naputi. Petitioner Santos also  
relies upon United States v. Pitney Bowes, Inc., 25 F.3d 66, 72 (2d Cir. 1994) for support, but  
there the court found untimeliness in an intervenor who had knowledge of his interest for 15  
months before moving, and only after parties had devoted substantial time and money over 8  
months to reach a settlement and had begun performing under the settlement agreement.

Finally, Petitioner Santos looks to Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941

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1 (7<sup>th</sup> Cir. 2000) for support but this case is equally irrelevant to the present analysis before this  
2 Court. In Sokaogon, the court denied intervention to a would-be intervenor who filed 5 years  
3 after the initial complaint, and after 6 months and substantial money and effort were spent by  
4 parties to achieve settlement. Id. at 949-50. Moreover, the court concluded the denied  
5 intervenor was asserting only an indirect and speculative interest in the outcome of the lawsuit,  
6 and sought to block a settlement agreement between parties merely to prevent the introduction  
7 of a new business competitor into the market. Id. at 946-47.

8 Petitioner Santos complains that Intervenor Naputi does not give any *reason* for delay  
9 in filing her motion to intervene. The straightforward answer is there was no delay on the part  
10 of Intervenor Naputi to address by explanation. Nor was there any *length* of a delay which  
11 would beg description because Intervenor Naputi did not delay in her moving to intervene,  
12 rather she acted diligently according to law. "In a class action, the critical issue with respect to  
13 timeliness is whether the proposed intervenor moved to intervene as soon as it became clear  
14 that the interests of the unnamed class members would no longer be protected by the named  
15 class representatives." Hill v. Western Elec. Co., 672 F.2d 381, 386 (4<sup>th</sup> Cir. 1982) (internal  
16 quotation marks and alterations omitted). Not only did Intervenor Naputi file her motion to  
17 intervene a mere 4 months after the initial complaint, she filed it 2 weeks after, and on the  
18 heels of, the announcement of a swiftly and secretly arranged settlement agreement. This  
19 timeframe does not even generally approach the lumbering spans of time spoken to by the  
20 rulings which Petitioner Santos cites in attempt to support her argument.

21 **2. Intervenor Naputi Bears A Significantly Protectable Interest Relating To**  
22 **The Subject Of This Class Action.**

23 Petitioner Santos would prefer to believe the only interest claimed by Intervenor  
24 Naputi is for a higher amount of recovery under the proposed settlement agreement, an issue  
25 she argues is more appropriate for the forum of the fairness hearing. Petitioner Santos again  
seeks to blind this Court to the more intrinsic injury inflicted on the class by her defining  
assertion as to whom she claims to represent: legally disqualified claimants of years 1998 and  
1999. The certainty of significant injury to those with legal entitlements to the Earned Income  
Tax Credit (EIC) by Petitioner Santos' improper class parameters clearly represents a subject-  
related, protectable interest of Intervenor Naputi and those similarly situated, apart from the

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1 possibility of disposition of compensation by settlement agreement or otherwise. Objecting at
2 the Fairness Hearing on the proposed settlement agreement itself does not afford opportunity
3 to alter the fact of Petitioner Santos and her counsel's inadequate representation of the class
4 they allege to exemplify before any consideration of settlement, by virtue of antagonistic
5 issues as well as Petitioner Santos counsel's class-imperiling performance and suspicious
6 propinquity to the opposing party.

7 Cases whose facts completely belie those surrounding Intervenor Naputi continue to be
8 trundled out by Petitioner Santos to prop up her argument that is based on a simultaneous
9 misconstrual of Intervenor Naputi's significantly protectable interest in the action. The district
10 court in Thompson v. Metropolitan Life Ins. Co. ruled that an interest justifying intervention is
11 insufficient if merely to protect a right to appeal a final judgment on a settlement agreement
12 from which intervenors chose not to exclude themselves, as it is unnecessary and unwarranted
13 in order to preserve the right to appeal and renders intervention superfluous. 216 F.R.D. 55, 69
14 (S.D. N.Y. 2003). Petitioner Santos next offers Ring v. Metropolitan St. Louis Sewer District,
15 41 S.W.3d 487 (E.D. Mo. 2001), which does stand for the proposition that "The judgment of
16 the trial court denying a motion to intervene will be reversed if it is not supported by
17 substantial evidence, is against the weight of the evidence, or erroneously declares or applies
18 the law. 41 S.W.3d at 491 (citation omitted). However, that court denied intervention where it
19 found only a difference of opinion as to the amount that should be received from the
20 settlement agreement and where the named class members represented all possible issues of all
21 types of interests. Id. As stated, the interest of Intervenor Naputi is far more crucial than a
22 mere opinion about the fairness of the settlement amount.

23 Two other cases emitting from Petitioner Santos to support her allegation regarding
24 duplicative arguments put forth by current parties also fall flat as opposed to on all fours with
25 Intervenor Naputi's asserted interests. The court's decision in Cajun Electric Power
Cooperative v. Gulf States Utilities was narrowly applied to the fact in that case that a
ratepayer regulatory body as putative intervenor could not posit a salient interest not already
forwarded by the existing parties, the electric cooperative and the public utility, in a suit over
fraud in a contract exclusively between those parties. 940 F.2d 117 (5th Cir. 1991). In Public
Service Co. of New Hampshire v. Patch, the court decided that a ratepayer advocate

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1 intervenor's interest in lower electric rates expected by rate restructuring was an overly
2 contingent and overly general economic interest that did not directly threaten a benefit
3 presently enjoyed by the applicant, where the suit was between electric utilities and public
4 utility commissioners over a plan to inject retail competition into the electric utility market.
5 136 F.3d 197 (1st Cir. 1998). Intervenor Naputi has emphatically and consistently asserted that
6 the adversely antagonistic positions between Petitioner Santos and Intervenor Naputi as to the
7 definition of the class they propound to epitomize contravenes the idea that Petitioner Santos
8 has embodied and championed the entirety of interests of Intervenor Naputi and those
9 similarly situated.

10 Petitioner Santos purports to claim that intervention would only increase transaction
11 costs of the litigation, while it is painfully clear present parties have thus far failed to expend
12 any significant costs or effort. The only real cost that has been suffered is by the class, whose
13 interests have been threatened by this shortcoming of the parties. Petitioner Santos actually
14 gets the holding wrong in one of the cases she presents on this point, Wilderness Society v.
15 Morton, 463 F.2d 1261 (D.C. Cir. 1972), where she incorrectly states that court denied
16 intervention. In fact, the court granted intervention to the applicant because sufficiently
17 antagonistic issues required it, and in so holding, the court was never even asked to address
18 litigation transaction costs as an issue. 463 F.2d at 1262-63. The other case offered for this
19 point is Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) for the general proposition
20 regarding the balance between resolving related issues in a single lawsuit and preventing the
21 lawsuit from becoming fruitlessly complex or unending. In striking this balance, the Smuck
22 court also stated: "The goal of 'disposing of lawsuits by involving as many apparently
23 concerned persons as is compatible with efficiency and due process' may in certain
24 circumstances be met by allowing parents whose only 'interest' is the education of their
25 children to intervene." Id. The court goes on to wonder if the concept of 'sufficient interest' is
too nebulous for consideration, but then states: "This does not imply that the need for an
'interest' in the controversy should or can be read out of the rule. But the requirement should
be viewed as a prerequisite rather than relied upon as a determinative criterion for
intervention. If barriers are needed to limit extension of the right to intervene, the criteria of
practical harm to the applicant and the adequacy of representation by others are better suited to

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1 the task.” *Id.* at 179-80. Incidentally, this case also does not deal with the issue of transaction  
2 costs which might frustrate efficiency.

3 Petitioner Santos futilely argues that Intervenor Naputi’s interest in avoiding injury,  
4 due to Santos’ class inclusion of claims invalidated by the statute of limitations, is not of  
5 consequence. By her own logic, not only does Petitioner Santos seek to represent individuals  
6 who are disqualified due to time-barred claims, but she would just as well represent anyone  
7 else who has no right to receive the Earned Income Credit whatsoever, arguably the entire  
8 taxpaying population of Guam. As previously submitted, the resultant injury to legally  
9 legitimate EIC claimants is direct, obvious and imminent, by whatever disposition of claims of  
10 Petitioner Santos’ faulty class – whether by diluted settlement payments or by judgment on the  
11 merits. This issue bears a primacy of priority *a fortiori* to the proposed settlement agreement,  
and to the question of whether the Government of Guam would settle for a higher amount per  
claimant if the number of claimants were reduced.

12 Petitioner Santos erroneously claims Intervenor Naputi must assume that the statute of  
13 limitations issue is not legally questionable. Of course, besides any hints and conjecture  
14 offered by Petitioner Santos orally at a scheduling conference, she herself has not and cannot  
15 provide any substantive law to place the applicable statute of limitations into doubt.  
16 Intervenor Naputi makes no assumptions but firmly and knowingly relies upon the law. This is  
17 because the law on this topic is clear and absolute: 26 USCA §6511 and its federal case  
18 progeny flatly prohibit any claims not made within 3 years of filing a return. The allusions by  
19 Petitioner Santos to a history of frustration by the Respondent of the ability of the class to  
20 claim the EIC is completely without merit. Not only does Petitioner Santos exhibit her  
21 ignorance of the law by failing to recognize the difference between a “return” and a “claim”  
22 (see Treas. Reg. § 301.6402-3, 26 CFR §301.6402-3), but more importantly she wrongly  
23 assumes that some “equitable recoupment” would somehow sustain time-barred claimants,  
whereas the law plainly holds it does not. See United States v. Dalm, 494 U.S. 596, 110 S.Ct.  
1361 (1990); see also Israel v. United States, 356 F.3d 221 (2d Cir. 2004) (Internal Revenue  
Code “look-back” provisions constrain EIC claims).

24 In direct contradiction to the allegation by Petitioner Santos that Intervenor Naputi  
25 misread the proposed settlement agreement, the agreement states in “**I. DEFINITIONS**” that

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1 the "EIC Class" is restricted to those who "***filed*** Guam income tax returns" (Settlement
2 Agreement p. 7, para. I) (emphasis added). Petitioner Santos indeed specifically seeks to
3 exclude claimants who are able to file an amended return or a late return. While Petitioner
4 Santos attempts to pervert Intervenor Naputi's concern about this exclusion to portray it as
5 some kind of hypocrisy, the truth is that Intervenor Naputi's assertion of the true class
6 definition has always been unequivocal: Only legally eligible claimants should comprise the
7 proper class. The law regarding the statute of limitations on this subject holds sway, and if
8 amended or late returns fall within the Internal Revenue Code look-back provisions, then they
9 are legally qualified to make such claims for the EIC. Intervenor Naputi has never contradicted
10 herself as to who should constitute the class.

11 **3. Intervenor Naputi's Ability To Protect Her Interests Is Necessarily**
12 **Impaired And Impeded By The Current Disposition Of The Class Action.**

13 Petitioner Santos attempts to dismiss the impairment of Intervenor Naputi's ability to
14 protect her interest by virtue of the current class action disposition by stating she may simply
15 "opt out" of the settlement agreement to no detriment. To preface, Petitioner Santos does not
16 dispute the fact that those who opt out of the settlement agreement and litigate individually
17 would be left with an unfunded judgment incapable of execution against the government.
18 Whereas Petitioner Santos is unimpressed by this problem, it represents an absolute
19 impairment of the ability of opters-out to protect their interest, in light of the fact that
20 approximately \$30 million dollars would have already been spent if not earmarked to pay
21 people other than those legally entitled to that money -- money which is appropriated for the
22 specific purpose of paying (presumably) legitimately entitled EIC claimants. The inherent
23 defect in Petitioner Santos' class definition effectively causes a direct and tangible impairment
24 of legitimate claimants' ability to protect their interests. Standing in line behind other
25 judgment creditors to the government is not a speculative or overbroad impairment where the
Government of Guam has identified and specifically carved out a \$60 million fund for the sole
purpose of refunding EIC claimants, yet one-half of this amount would be robbed from
legitimate EIC claimants (because adding claimants from 1996, 1998 and 1999 to the class
doubles the class size). Opting out of the settlement agreement would preclude the ability to

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1 legally challenge it, and opting in to the settlement agreement would condone the  
2 disbursement of one-half the identified funds to others who do not legally deserve it. If  
3 Petitioner Santos did not try so hard to pay more disqualified recipients (e.g., by expanding his  
4 own class in the settlement agreement to benefit stale 1996 claims), then there would exist  
5 approximately \$30 million more in the Government's coffers to pay judgments of opt-out  
6 litigants, a waste which concretizes the impairment of Intervenor Naputi's ability to protect  
7 her interest, as well as those similarly situated to her. "If an absentee would be substantially  
8 affected in a practical sense by the determination made in an action, he should, as a general  
9 rule, be entitled to intervene." Southwest Ctr. For Biological Diversity v. Berg, 268 F.3d 810,  
10 822 (9<sup>th</sup> Cir. 2001).

11 Once again, Petitioner Santos utilizes inapposite case law which does not support her  
12 argument. The District Court, in In re Lorazepam, did find that intervenors there could opt out  
13 of a settlement to preserve their rights, but only because the court found no colorable prejudice  
14 to the intervenors' ability to protect their interest in the first place, regardless of whether they  
15 opted in or opted out of the settlement agreement, since the intervenors' basis for intervention  
16 was merely to obtain discovery so they could decide whether to stay in or opt out of the  
17 settlement agreement and since intervenors did not object to the settlement itself. 205 F.R.D.  
18 363, 366-67 (D.C. Cir. 2001). The court also denied intervention due to untimeliness and a  
19 determination that a refusal to grant non-party intervenors discovery by class counsel did not  
20 constitute inadequate representation. Id. at 367-68. This case presents a very disparate  
21 situation than that of Intervenor Naputi, where her interest is already prejudiced by Petitioner  
22 Santos' disposition of the class action, even before account is taken of the settlement  
23 agreement; where she has in fact objected to the settlement agreement in her pleadings; where  
24 her basis for intervention is far more than just to seek discovery; and where there is ample  
25 evidence of failed performance and suspicion of collusion by Petitioner Santos' counsel to  
attest to inadequate representation of the class. These facts alone demand intervention to  
protect significant interests of Intervenor Naputi, and for which opting out of a specious  
settlement agreement could not possibly cure. Petitioner Santos also looks to In re Vitamins  
Antitrust Class Actions, 215 F.3d 26 (D.C. Cir. 2000); however, the appellate court there  
denied intervention because appellants essentially had no interest in the specifics of the

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1 settlement agreement, but only in the collateral effect upon them by one of its clauses. 215
2 F.3d at 29. Here again, the jeopardized ability of Intervenor Naputi to protect her interests lies
3 in the misrepresentation of herself as a class member by Petitioner Santos, as an antecedent to
4 going in on her behalf to negotiate any settlement. That misrepresentation inheres, of course,
5 in the disfigurement by Petitioner Santos of the class member parameters, whereby Petitioner
6 Santos sabotages the interests of Intervenor Naputi by lumping her in with illegitimate
7 claimants. Opting out of the settlement stands far and apart from the analysis of this more
8 ingrained impairment of interest.

9 Petitioner Santos also takes issue with Intervenor Naputi's assertion that intervention
10 is additionally necessary to protect claims for refunds arising in tax year 2000. She accuses
11 Intervenor Naputi of adopting a Janus-like mentality by arguing entitlement to claims within a
12 year that she simultaneously argues is time-barred. By her misstatement of Intervenor
13 Naputi's position, Petitioner Santos demonstrates an alarming ignorance of the law regarding
14 statutes of limitation tolled by litigation. Intervenor Naputi even cited the seminal case on
15 point, American Pipe and Construction Co. v. Utah, wherein the U.S. Supreme Court held
16 "that the commencement of a class action suspends the applicable statute of limitations as to
17 all asserted members of the class who would have been parties had the suit been permitted to
18 continue as a class action." 414 U.S. 538, 554, 94 S.Ct. 756 (1974). This stands as yet another
19 reason why opting out of the settlement agreement would impair Intervenor Naputi's ability to
20 protect her interest (namely in claims arising from tax year 2000). Petitioner Santos purports to
21 promote the interests of Intervenor Naputi as a class member and thusly, her filing of the class
22 action petition on February 12, 2004 tolled the statute of limitations for tax year 2000, which
23 would have otherwise run as of April 15, 2004. As Petitioner Santos would rather force
24 Intervenor Naputi to opt out of the settlement agreement than intervene in the action, this
25 would cause her plain legal prejudice by depriving her of her legal right to litigate that
particular cause of action. As opposed to preserving the ability to protect an interest, opting
out of the settlement would only serve to directly exterminate said interest.

23 **4. Petitioner Santos Inadequately Represents Intervenor Naputi And Those**
24 **Similarly Situated.**

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1 The basic argument submitted by Petitioner Santos is that she and Intervenor Naputi
2 share the same interest in being refunded some amount of money by the Government of Guam
3 pursuant to the mandate of the EIC; and furthermore, the desire of Intervenor Naputi to receive
4 a higher amount than the settlement agreement dictates is not severable from the identical
5 interest shared by Petitioner Santos. Moreover, Petitioner Santos proclaims that this desire is
6 better left for expression at the fairness hearing. While it is obvious that Petitioner Santos and
7 Intervenor Naputi share the same interest in receiving EIC refunds, what Petitioner Santos
8 continually hopes this Court will overlook is that the interests of each party as to *whom* should
9 receive the EIC refunds are fundamentally antagonistic to each other. Intervenor Naputi and
10 Petitioner Santos strongly disagree as to which claimants should constitute the proper class.
11 The logic of Petitioner Santos' argument follows that if she saw fit to devise a definition of the
12 class of EIC entitlees to include every man and woman on Guam, and then further expanded
13 the "class" to include every child on Guam during the course of settlement negotiations, then
14 any complaint raised by Intervenor Naputi regarding improper class parameters is merely a
15 greedy ploy to increase her share of recovery by reducing the "class" size. Unfortunately for
16 Petitioner Santos, this obtuse, self-serving argument is easily exposed for attempting to
17 obscure the truth regarding the issues in contention.

18 The U.S. Supreme Court has stated that intervention as of right "is satisfied if the
19 applicant shows that representation of his interest 'may be' inadequate; and the burden of
20 making that showing should be treated as minimal." Trbovich v. United Mine Workers, 404
21 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10 (1972). The test for adequacy of representation is
22 assessed by three factors: 1) present party's interest will undoubtedly cause it to make all of
23 intervenor's arguments; 2) present party is capable and willing to make said arguments; and 3)
24 present party does not neglect necessary elements offered to proceeding by intervenor; the
25 most important factor being how intervenor's interest compares with present party's interest.
Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003) (citation omitted). By way of
comparison, it is abundantly clear that Intervenor Naputi's and Petitioner Santos' interests in
entitlement to class are directly contravening. Petitioner Santos' stated interest in class
definition affirmatively restricts her from advancing the converse interest of Intervenor Naputi.
Besides being incapable of arguing Intervenor Naputi's interest, Petitioner Santos showed she

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1 is also unwilling to so argue, as her counsel has instead succeeded to further despoil Intervenor
2 Naputi's interest by expanding the "class" to add more illegitimate claimants during settlement
3 negotiations. As for neglecting necessary elements offered by Intervenor Naputi, Petitioner
4 Santos' characterizations in her written opposition to Naputi's motion to intervene stand as
5 testament to a strident denial of Intervenor Naputi's position and interest, as opposed to just a
6 mere neglect of them.

7 Petitioner Santos cites three cases for her proposition that she shares a common interest
8 with Intervenor Naputi who only evinces a different motive, yet too, these cases miss the
9 mark. The court, in In re NASDAQ Market-Makers Antitrust Litigation, found adequate
10 representation but only where intervenor sought intervention as a vehicle to obtain payment in
11 another unrelated case and to create a whole new lawsuit; and since his subject matter was too
12 remote and he lacked sufficient common questions, denial of intervention would not prejudice
13 him. 187 F.R.D. 465, 490-91 (S.D. N.Y. 1998). The court did note, however, that relevant
14 factors to intervention are the *degree* to which intervenor's interests are adequately represented
15 by present parties, and whether intervenor "will significantly contribute to full development of
16 the underlying factual issues in the suit and to the just and equitable adjudication of the legal
17 questions presented." *Id.* at 491. The second case utilized by Petitioner Santos is Washington
18 Elec. Coop., Inc. v. Mass. Municipal Wholesale Elec. Co., 922 F.2d 92 (2d Cir. 1990).

19 Therein, the Circuit Court found an identical identity of interest between present party and
20 intervenor where present party sought payment to its members and intervenor only sought to
21 ensure members were paid a fair amount. *Id.* at 98. However, as previously expounded upon,
22 the dispute between Intervenor Naputi and Petitioner Santos resides not in the amount of
23 payment but in the more central issue of who should be paid. Petitioner Santos offers a third
24 case, Blake v. Barnes, 554 F.2d 947 (9th Cir. 1977), to scoff at the idea that necessary elements
25 are offered by proposed intervenors; however, in that case the intervenor simply did not
choose to explain whether present party may or may not already be advancing intervenor's
argument. 554 F.2d at 955.

26 Petitioner Santos continues to insist her interest sits squarely with that of putative
27 intervenors, misrepresents Intervenor Naputi's position, and then incorrectly derides her for
28 supposedly assuming that a difference of opinion regarding the amount of recovery settled for

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1 in the agreement would allow her intervention on the grounds of inadequate representation.  
2 Nothing could be further from the truth, yet Petitioner Santos persists in skirting around the  
3 true nature of Intervenor Naputi's interest. Whereas Intervenor Naputi's interest in class  
4 composition is antagonized as early as Petitioner Santos' complaint for class action, the  
5 settlement agreement only exacerbates the dissension from that interest. If anything, the  
6 settlement agreement serves to divorce Petitioner Santos' own interest from that of the class  
7 she herself claims to represent, by eliminating claimants of her own "class" who did not file a  
8 tax return. Intervenor Naputi has submitted she additionally stands for those who would file an  
9 amended or late return, thus her interests and those of whom she seeks to represent are yet  
10 additional interests further rebuked by Petitioner Santos. Repeating her charge that Intervenor  
11 Naputi suffers a type of 'buyer's remorse' and nothing more, Petitioner Santos invokes Linney  
12 v. Cellular Alaska Partnership for the proposition that a fractional amount settled for by  
13 agreement does not *per se* denote a grossly inadequate settlement. 151 F.3d 1234, 1242 (9<sup>th</sup>  
14 Cir. 1998). More important to the present case than the court's assessment of the fairness of  
15 the settlement agreement is the court's finding that inadequate representation did not exist  
16 because appellants did not argue that class representatives were unqualified, were antagonistic  
17 to the class, or were in collusion with the defendant. Id. at 1241.

18 Petitioner Santos attempts to avoid blame for the fact that her counsel sought no actual  
19 discovery in the case by downplaying the necessity for it. Petitioner Santos again looks to  
20 Linney to excuse formal discovery "where the parties have sufficient information to make an  
21 informed decision about settlement." 151 F.3d 1234, 1239. However, the Ninth Circuit only  
22 made this ruling where they found that class counsel properly relied on the work product of  
23 former counsel, analogizing to discovery developed in prior or related proceedings. Id. at  
24 1239-40. Such is not the case for Petitioner Santos' counsel; rather counsel relied on a single  
25 federal *projection* of economic growth rate analogized to Guam, as opposed to bothering to  
analyze any actual tax rolls. As opposed to having sufficient information for an informed  
decision about settlement, counsel for Petitioner Santos was evidently satisfied to operate on  
next to no information, which highlights her inadequate representation of Intervenor Naputi  
and the class as a whole.

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1 Petitioner Santos proceeds to try to elude responsibility for her meagerly insufficient
2 notice to potential class members, another demonstration of her inability to adequately
3 represent the class and Intervenor Naputi. Petitioner Santos deigns to blame the judge for
4 condoning her having spurned her duty to adequately provide notice to potential class
5 members according to law. It was only after Intervenor Naputi pointed to Petitioner Santos'
6 counsel's failure to protect the class by individual notice did counsel make any statements that
7 he would try to redeem his omission by effectuating mailed notice. It is unclear whether
8 counsel for Petitioner Santos has taken any steps to follow through on rectifying his error.
9 Nevertheless, even after failing to individually notice the class members he failed to attempt to
10 ascertain in the first place, counsel for Petitioner Santos failed to follow the orders of the court
11 regarding notice by publication, by failing to ensure the second and third notices were
12 published as ordered (which they were not). Petitioner Santos' reliance on the utterance that
13 notice protections are purely procedural does not disguise her many examples of inadequate
14 representation. Petitioner Santos also attempts to minimize the factual inaccuracies of the
15 singular published notice provided by putting a positive spin on her misstatement about what
16 was (not) ordered by the court concerning attorney's fees. Meanwhile, she ignores that the
17 notice inaccurately described the lawsuit as a certified class action, her attorney as designated
18 class counsel, and possessed a glaring absence of any contact information for her counsel that
19 bespoke of his inaccessibility to class members.

20 Finally, as to the uncomfortable closeness between Petitioner Santos's counsel and the
21 defendant, she asserts that Intervenor Naputi cannot actually prove any conflict of interest. Yet
22 it remains odd that counsel negotiated a settlement relatively quickly with his former client,
23 the Lieutenant Governor of Guam, having represented him in litigation against the Governor
24 of Guam, and where counsel negotiated the settlement with his client functioning as the Acting
25 Governor while the Lieutenant Governor's nemesis in said litigation, the Governor of Guam,
was briefly away from the jurisdiction. Intervenor Naputi relies upon case law previously
argued in her motion to intervene for the principle that adequate representation requires an
unlikelihood that the suit is collusive and that class counsel act at arm's length from the
defendant, and that courts look to counsel's demonstrated performance in the action itself.
Petitioner Naputi seeks again to defray the accountability of her counsel by attempting to draw

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1 suspicion to Intervenor Naputi's relationships. Petitioner Santos points to connections to the  
2 Attorney General of Guam, however he is not a party to the action. She also indicates one of  
3 Intervenor Naputi's attorneys is married to a Guam Senator, although the Guam Legislature is  
4 not a party to the action either. Lastly, Petitioner Santos declares that one of Intervenor  
5 Naputi's attorneys actively represents the Republican Party of Guam, which is as irrelevant as  
6 the fact that Petitioner Santos' counsel is the chairman of the Democratic Party of Guam. No  
7 conflicts of interest exist between Intervenor Naputi's counsel and any of the parties to this  
8 action.

8 **5. Intervenor Naputi Should Alternatively Be Permitted To Intervene.**

9 Petitioner Santos fails to raise anything of significance in her objection to the  
10 permissive intervention of Intervenor Naputi. Intervenor Naputi asks this Court look to legal  
11 arguments raised in Intervenor Naputi's motion to intervene for authority justifying her  
12 permissive intervention. Petitioner Santos raises one case to analogize why a perceived  
13 attempt to "scuttle" the proposed settlement agreement should warrant denial of permission to  
14 intervene. However, the court in Woodward v. Nor-Am Chemical Co. struck their balance of  
15 interests in favor of denying intervention where the intervenors lacked common questions of  
16 law and fact to present parties (i.e., claimed injury was a secondary exposure by spouses and  
17 relatives of class members to a substance from which the class suffered direct occupational  
18 exposure). 1996 WL 1094746 (S.D. Ala. 1996).

17 **Conclusion**

18 Intervenor Naputi has previously demonstrated that her interests and position in this  
19 case necessitate her intervention in this class action as of right. Intervenor Naputi moved to  
20 intervene in a timely fashion; she possesses a significantly protectable interest relating to the  
21 subject of the action; her ability to protect her interest is necessarily impaired and impeded by  
22 the current disposition; and her interest is inadequately represented by Petitioner Santos.  
23 Petitioner Santos' specious arguments and inapposite case law do not alter this earned right to  
24 intervene. For the reasons as set forth above, and to achieve a just and proper outcome in this  
25 matter, the court should grant the motion for intervention submitted by Petitioner/Intervenor  
Christina M.S. Naputi. Petitioner/Intervenor Christina M. S. Naputi additionally requests that  
an Article III federal judge hear this matter.

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1 Respectfully submitted this 29th day of July 2004.

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3 VAN DE VELD SHIMIZU CANTO & FISHER

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5 Curtis C. Van de veld, Esq.

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**CERTIFICATE OF SERVICE**

I, CURTIS C. VAN DE VELD, certify that I caused a copy of the foregoing document here filed to be served on counsel for the parties and prospective party on July 30, 2004, via hand delivery at the following addresses:

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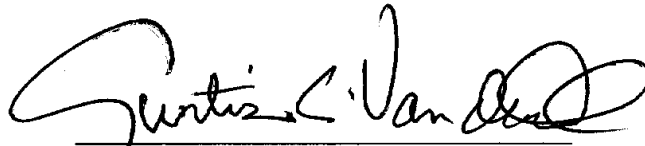
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